

Presentation of the new OHADA law on cooperatives

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September 2012

Foreword

This document aims to complement the training proposed to cooperative members or other persons interested in the new law on cooperatives within the member states of the OHADA. This presentation cannot be comprehensive, for lack of space. This presentation is chiefly meant to be understandable by the average reader and to introduce the key concepts required to the cooperative law: in other words, it is not meant for law professionals. The introduction tracks back the historical and legal context of the current situation of African cooperatives. Afterwards, the content of the uniform act will be synthetically presented. The document focuses on the general principles governing the cooperatives, which will enable readers, first, better to understand the technical rules applicable and secondly, will serve as a pedagogical tool as to the basic cooperative mechanisms. In such light, after a first section which will provide the reader with an indispensable introduction, the second section will summarily introduce the cooperative principles, which will be shown to be the basis of the cooperative companies. Finally, and rather cursorily, the basic elements of the organization of cooperatives will be sketched.

1 Introduction

1.1 Historical elements

Cooperative companies, like commercial companies, are intimately linked to the historical context.¹ They rose in Europe in the 19th century, starting in the 1830s, and have gradually developed, increasingly spreading abroad and diversifying their forms.

History is difficult to set in stone, and the choice of dates and events is bound to be somewhat arbitrary. At any rate, the cradle of the cooperatives is classically located in England and France, and then in Germany, the first three countries to experience the Industrial revolution. To each of these three countries its own form of cooperatives: in England, consumption cooperatives², in France, (industrial workers') production cooperatives³ and in Germany, savings and credit cooperatives⁴. Such presentation is simplistic, for all three families have co-existed in all three countries, yet each category was prominent or better organized in one particular country.

¹ For instance, public limited companies developed as capitalism itself grew.

² Consumption cooperatives are groupings of consumers united in order to obtain, through sheer force of number, better prices and products than what they did with small shop owners, considered as exploiters of the people's poverty.

³ Workers cooperatives are grouping of factory (and other) workers united to establish together an undertaking based on their competences (for instance, shoemakers' cooperatives) from the standpoint of which they are simultaneously bosses and employees, so as to eschew the thrall of businessmen, who imposed execrable wages and inhuman working conditions.

⁴ Savings and credit cooperative are groupings of people who, due to their absolute or relative property, were excluded from traditional banking services and decide to mutualize their savings so as to be able to grant loans to members and thus facilitate their economic development, absolute or relative (such loans are for professional and not domestic purposes).

It is hardly a coincidence that cooperative should have been invented at a time of industrial revolution and development of capitalism. It is well-known that, as early as this period, strong criticism has been formulated towards capitalism⁵. Around the same time, or even slightly earlier, a radically different form of criticism had been formulated. Stemming from the same findings of scandalous and growing inequality and abusive exploitation of the weakest by the richest, such criticism proposed very different solutions: not a revolution to destroy these inequalities, but rather the promotion of community experience, which would achieve a liberating equality. These communities were meant to be models to be followed by all.

In such perspective, the most famous authors (Charles Fourier in France, Robert Owen in England) imagined functioning rules for ideal societies, with no consideration as to any immediate realization. These conjectures inspired the first cooperatives, whose first successful and sustainable instance, and whose History has recorded the name as the founder of a global movement, is that of Rochdale: factory weavers from Manchester, England, gathered to found a consumption cooperative, whose activities spread to education, and whose articles of incorporation had some of the features of modern cooperatives. Despite their diversity, cooperatives always have an identical purpose: people group to escape from the economic and social exploitation of those who dominate them.

As mentioned above, this purpose can take the form of many activities, among them one is essential to mention here, although we have not done so yet, because of its paramount importance in Africa: the agricultural cooperative. The agricultural cooperative is a grouping of peasants who assemble to effectuate together operations of purchase of seeds and fertilizer and/or of sale of their crops⁶.

Cooperatives have spread all over the world, including Africa. Formally, they came, in the legal sense, from Europe, since they are an element of the legal system imported together with colonization. However, they have met, in Africa, with traditional forms of organization somewhat similar to them: village associations, tontines... These forms are however different as they are rooted in customary African law and are organized differently, in the context of traditional social hierarchies.

1.2 Sources of cooperative law

The main inspiration for cooperative law is the International Cooperative Association (ICA)⁷. Besides the diversity of forms observed globally, the ICA finds common features. At a very early stage, the ICA established a definition of the cooperative as well as of its main principles. The last edition, following a series of amendments, is dated 1995.

This cooperative declaration does not, in itself, have any legal value, as it was authored by a purely private organization which, in spite of its representativeness, has no internationally-recognized competence. Its provisions are, however, at least indirectly consecrated. First, it is referred to by the UNO and a recommendation of its general assembly recommends compliance

⁵ The most famous one is that authored by par Karl Marx in the mid-nineteenth century, which emphasizes the role of history and, by the appearance of the proletariat as a class opposed to the capitalists, must , lead to socialism, defined by the collective property of production means and the disappearance of classes. This trend is called “scientific socialism”.

⁶ If a hundred peasants unite, the quantity of seeds they wish to buy or crops they wish to sell will be more important and they could more advantageous prices in each case.

⁷ Established in London in 1895, this organization groups cooperative movements from several countries of the world and, on the basis of such cooperative experience, seeks to lay the bases of a cooperative doctrine.

therewith. In a more binding fashion, the International Labor Organization has issued a recommendation, requiring all its members to pass compliant legislation and adopt public policies supporting cooperatives, which are deemed to favor development. In Europe (as in other continents), cooperatives are governed by national laws⁸. The European Union also took interest in the cooperatives and, as it had instated a European company⁹, has created, by way of a regulation¹⁰ a European cooperative society. However, it should be noted that this European cooperative society has a limited appeal as it may only be incorporated when cooperatives with activities in several Member States establish together a European cooperative society.

The situation is quite different in the OHADA area. Member states have passed different laws since acquiring independence. Generally, the first laws established strong bonds between States and cooperatives, reduced to being mere tools of the powers that be. More recent laws have gradually erased such bonds to strengthen the autonomy of the cooperatives as private undertakings, but have sometimes simultaneously weakened compliance with cooperative principles for lack of supervision.

After nearly ten years of negotiations within the OHADA, a Uniform Act (UA) was approved on 15 December 2010 and published on 15 February 2011 in the OHADA's official gazette (OHADA Uniform Act relating to cooperative companies law). This innovation is far more important than that caused by the adoption of the European regulation. Indeed, the UA does not create a new form of cooperative which would simply be added to those existing under national law. The new regulation actually *replaces* pre-existing laws, which, therefore, are meant to expire, or at most exist only as a complement to the UA (Art. 2). The Uniform Act came into force 90 days after its publication, on 15 May 2011 (Art. 397). It is therefore expressly demanded that existing cooperatives should amend their articles of incorporation within two years of this entry into force so as to comply with the new rules (Art. 396), to wit before 15 May 2013. Thus, we will mainly quote the Uniform Act and cited articles of incorporation herein shall refer thereto, if not mentioned otherwise.

1.3. Definition of the cooperative society

The first source is the ICA's declaration¹¹ defining the cooperative society as an autonomous association of people, voluntarily united to fulfill their common economic, social and cultural aspirations and needs through a jointly-owned and democratically-controlled enterprise. The primary difference between commercial and cooperative companies, is that the former aim to maximize profit. Other characteristics are also essential and will be analyzed in further detail below, but this first opposition does establish a remarkable divergence.

This pursuit of the members' interest is related to the double quality of the cooperator-shareholder, simultaneously member and shareholder. Being a shareholder he is a party to the society agreement, holds shares and has rights and obligations related thereto (voting rights and right to apply to elective positions, in particular, but also liability as to the cooperative debts if distressed). As a cooperator, he is party, with the society, to the cooperative agreement and has rights and obligations thereunder, notably to participate in the society's activities (contribute crops

⁸ In the French example, cooperatives are chiefly governed by Law no 47-1775 of 10 September 1947 establishing a status of the cooperation, complemented by other taking into account the particularities of specific kinds of cooperatives (agricultural, banking, consumers'...).

⁹ Regulation (CE) n° [2157/2001](#) of the Council dated 8 October 2001.

¹⁰ Regulation (CE) n° [1435/2003](#) of the Council dated 22 July 2003.

¹¹ Accessible on the ICA's website, both in English and French : <http://www.ica.coop>

in an agricultural cooperative, savings in a savings and credit cooperative, labor in a workers' cooperative...) and to earn fair remuneration in consideration thereof.

The UA defines the cooperative precisely (Art. 4): «the cooperative society is an autonomous grouping of persons, voluntarily united to fulfill their common economic, social and cultural aspirations and needs through a jointly-owned and managed and where power is exercised democratically and according to the cooperative principles».

We will here limit ourselves to a few observations, as a more detailed presentation will be made in the sections below. First, one can note the differentiation between a cooperative and a corporation: although named a cooperative society, it is defined by the UA as a "grouping of persons". Secondly, the purpose of the cooperative is to fulfill the needs of its members; these needs are clearly defined: they may be not only economic, but also social and cultural (thus, education has an important role as seen below). Thirdly, an obvious but important remark: cooperatives are undertakings; and while they radically differ from capitalist enterprises, it is no way a social or philanthropic Endeavour (neither a NGO nor an association), it is a bona fide undertaking, with all its inherent constraints although, as noted by these documents, its purpose is not lucrative. One last element, to which we shall return later, is the organization of the cooperative: it is collectively owned by its members, which manage it democratically.

The definition is completed by precisions as to the cooperative's activities. The scope of these activities is not defined (Art. 5), so that the corporate purpose is freely determinable¹² the only requirement being that it should appear in the articles of incorporation. Such silence is remarkable. By way of exception, Article 20 states that if the activity pursued requires the granting of an authorization, such activity is governed by the laws applicable thereto, and Article 2 expressly states that savings and credit cooperatives are governed, as to their activities, by the applicable national or regional laws. The solution may be explained by the impossibility, for the law, to include all fields of human activity. It is not satisfying, though, as the activity might affect the cooperative's organization and functioning, in particular from a financial standpoint. It is then up to the articles of incorporation to compensate the silence of the law.

The Uniform Act, however, introduces a rather interesting notion, that of "common bond", defined by Article 8 as "the objective element or criterion which cooperators share and on the basis of which they unite. It may, in particular, be relative to an occupation, a common purpose, activity, or legal form". This concept is used, in particular, to limit the share transfers or to validate the entry of new members into the society (Art. 217 et seq. and 380 et seq.).

Finally, one should note that the UA creates two kinds of cooperative companies: simplified cooperatives and cooperatives with a board of directors. We are not in a position to specify the rules applicable to each kind in detail and we will simply sketch a general presentation, while specifying the particularities applicable to each kind as needed. Although not expressly stated in the UA, it follows that one of these two forms must necessarily be elected. Given the extreme importance of this choice, we refer our readers to the annex, which specifies each variety's features thoroughly..

The above has already painted the distinctive shape of the cooperative, which will further be refined by the examination of cooperative principles.

2. Cooperative principles

Let Article 6 of the UA serve as an introduction " The cooperative society is organized and run,

¹² Article 20 states that the purpose of the cooperative consist in its activity.

and engage in its activities further to universally-recognized cooperative principles, namely: voluntary, open to all adherence; power being democratically exerted between the members; economic participation from the members; autonomy and independence; education, training and information; cooperation between cooperative organizations; and voluntary commitment towards the community”.

This provision quotes seven principles, precisely those of the International Cooperative Alliance. Their value is recognized, at least symbolically, is acknowledged since they are qualified as "universally recognized". They will not be examined one by one, but alongside three guidelines which allows a decent, if slightly arbitrary categorization. Indeed, they either relate to the collective character of the cooperative, to its non-lucrative purpose, or to its openness to the outside to the outside world.

2.1 The communal dimension

The first meaning of that communal dimension is that the members decide to do business together. It translates legally as a collective ownership and managerially as democratic governance.

2.1.1 Doing business together

In recent years, commercial companies have become increasingly instrumental (literally) and abstract, leading to the recognition of one-shareholder companies. They provide businesses with a legal mould, and the entrepreneur decides to run that business in a legally autonomous way. This option is not available to cooperative and may not be: by design, cooperatives need cooperation between several persons and may be not conjugated in the singular form. The minimal number of members is not set generally, but for each kind of cooperative: five for simplified cooperative companies, fifteen for cooperatives with a board of directors – therefore no cooperative may be established with fewer than five members.

Obviously, these numbers are not maxima, but the originality of cooperatives as compared to commercial companies lies in the fact that the number of shareholder may increase as the society grows: so as to facilitate the development of the society as well as that of its members, the share capital is variable. Thus, the cooperative may, with no conditions of form¹³ issue new share which may be subscribed to by existing or new members. Such variability works both ways, though, as the cooperative may redeem shares from its members, which results in a reduction of capital.

Such reduction may happen in three cases: partial departure (abandon by a member of part of his/her shares), integral departure and, more originally still, exclusion of a member by the cooperative. Such exclusion is not discretionary and must be justified by the cooperators’ faults (Art. 14 (2)). Exclusion is decided in last resort by the general meeting, such organ serving as an appellate jurisdiction when the exclusion is decided by the board of directors, and the common law jurisdiction remains at any rate competent (Art. 15 (4)).

At this stage, the amount of the redemption value of the shares is problematic. Insofar as the purpose of the cooperative is the common development of its members (art. 4), the redemption may not use the real value of the shares, which might have grown as the business developed, by contrast with capitalist companies. Globally, numerous laws, such as several laws abrogated by the new UA, provide for reimbursement at nominal value, i.e. the amount the shares were

¹³ For ordinary companies, the share capital is fixed. Its amount appears in the articles of incorporation and any increase or decrease triggers a subsequent amendment to such articles of incorporation (hence the convening of an extraordinary general meeting, filing with the Register...). No such requirements exist as to cooperatives.

subscribed at. The UA is more flexible, stating that the redemption value will be appreciated according to the provisions of the articles of incorporation (Art. 11 (3)). This would allow for a re-evaluation of the shares, for instance, to incorporate inflation, but a straightforward use of the real value of the shares might contravene with the cooperative principle stated in the UA. Thus, the evaluation will be made by the cooperative and, in case of a dispute, it will be resolved by the umbrella organization, or even by the common law jurisdiction (Art. 53). At any rate, this is subject to the provisions of the articles of incorporation; so that the articles of incorporation may also stipulate that redemption will be made at nominal value.

2.1.2 Collective property

The cooperative society is financially chiefly materialized by its share capital, equal to the shares issued. Its nature is identical to that existing in commercial companies, except for its variability, which results in a lessened security for third parties and a weakened stability for the cooperative itself: since the share capital may decrease, the patrimony of the cooperative may plummet. On the other hand, cooperatives are characterized by an increased obligation to allocate resources to the reserve when compared to classic companies. The UA creates three legal reserves: a general reserve, with no further precision, a reserve specially affected to training, education and publicity, and a reserve with no special affectation (Art. 114). Furthermore, these reserves are subject to a special regime, which is of particular interest. Indeed, these reserves are out of the members' reach: they may not, directly or indirectly, withdraw any amount there from, even on departure or dissolution of the cooperative. They are collectively owned by the cooperators (Art. 4), in the full legal sense, since there is no individual right as to these reserves.

Therefore, if there are net assets on dissolution, they may only be allotted to another cooperative or an umbrella organization (Art. 196). Consequently, the activity of the cooperative cannot benefit only a handful of members; the cooperative will rather benefit the members taken as a whole, which notion dwarves the cooperative itself. Where the cooperative prospers, it can only benefit future members. This is an excellent safeguard against any temptation of demutualization, i.e. the abandon of cooperative principles for the sake of quick money. The cooperative may not transform into a commercial company; if this goal is sought, the only solution would be to dissolve the cooperative and incorporate a commercial company, but on dissolution the above rule on the distribution of the net assets shall apply.

2.1.3 Democratic management

The democratic character of the cooperative chiefly appears through the adoption of a fundamental political principle: one person, one vote (Art. 102). This principle means that, during general meetings, each cooperator, regardless of his/her proportion of the share capital owned, date of entry into the cooperative, age, or position in the social and traditional hierarchy, has a vote equal to all other votes. This is a classic feature of cooperatives, not unlike other entities within social economy, by contrast with commercial companies, but also with traditional African structures similar, in other regards to cooperative (notably by their consideration of community and solidarity).

As important as this democratic principle, it is not sufficient in itself and requires additional guarantees. It should be reminded, on that subject, that the Uniform Act does not provide for any maximal amount of shares per shareholder; such solution is problematic, as it does not instate genuine democracy. Indeed, what of the freedom of cooperators of one holds 90% of the share capital and is thus in a position to blackmail the other members, by threatening to leave

the cooperative with 90% of its assets with the guarantee of having the shares reimbursed? True, the UA allows for the loophole to be filled in the articles of incorporation (art. 18 10°). The provisions regarding the representation by proxy at the general meeting is rather limited and the articles of incorporation may determine the matter freely (Art. 100); which prevents the executives to gather enough proxies to obtain a majority at the meeting.

In any case, besides voting rights, democracy also relies on the competences of the general meeting, regarded as the cooperative's sovereign organ. Conversely, all members may hold executive positions; the uniform act does not state the modalities of the appointment or the duration of the mandates and lets the articles of incorporation determine the matter (Art. 224 and 299). The cooperative is also democratic on a fundamental level since the uniform act prohibits any form of discrimination based on gender or ethnic, religious or political affiliation (Art. 6). This principle chiefly prohibits discrimination, on these criteria, of candidates to membership, but is prevalent all along the cooperative's duration.

Democracy is also connected with the autonomy and independence principle restated at Article 6. The main idea is independence vis-à-vis the State, first introduced in reaction to Soviet Union cooperatives which were not affiliated with the ICA, but may also apply to the situation of some postcolonial States, which have sometimes tried to instrumentalize the cooperative movement. Technical provisions bear no trace of this concern, which is hard to translate in precise terms. It should be noted, however, that the powers that be have no position in the cooperatives or the umbrella organizations. Though litigation may be ruled by courts, the administration does not supervise the cooperatives specifically. They can yield important indirect power, however, through Article 178, which enables any interested person to petition before the competent court to have the society dissolved in case of serious or protracted dysfunction (cf. *infra*); and it is perfectly conceivable that the administration could be considered as an interested person.

The only provision to be legally inserted in the articles of incorporation regarding autonomy shall indicate (art. 18 18°): "the scope of actions with non-member users, in light of the safeguard of the autonomy of the cooperative". In other words, the articles of incorporation must find a balance between too strong of an autonomy, which could thwart the functioning of the cooperative and excessive extension, which would make it dependant on the activities of non-members.

2.2. The non-lucrative aspect

2.2.1. Outline of the non-lucrative aspect

Some African national laws stated expressly that cooperatives were not lucrative but this provision is absent from the Uniform Act, purposely less dogmatic so as to avoid the uncertainties as to the definition of "non-lucrative". It is remarkable, indeed, that the cooperatives are considered lucrative or non-lucrative depending on the country, but this is more of difference regarding definitions than a dispute on substance. Non-lucrative situations are those where profit is either not sought or not shared, depending on the national law. Cooperatives are essentially at the crossroads: as undertakings, they necessarily seek profit, lest they falter, and striving to achieve common development of its members, they do not aim to enrich their members. This indifference towards its members' enrichment is obvious as the common development referred to in the uniform act is not only economic but also social and cultural.

Paradoxically, the choice not to admit expressly the non-lucrative character of cooperatives may simply be analyzed as a translation of the idea that the main objective of the cooperative is not the pursuit of profit. Thus, the text avoids the term « gain » and prefers « net

surplus », so as to take into account the accounting reality without using the qualification used in the capitalist economy.

2.2.2. Fate of the Net Operational Surplus

Net operational assets consist in the income remaining after all charges have been paid. What of them? Their first affectation is the incorporation to the legal reserves: on the one hand, general reserve, on the other, reserve specially used for formation, training, and publicity of the cooperative principles (Art. 114). Each of these two reserves must be funded to the extent of at least 20% of the surplus, until the reserve is equal to the amount set in the articles of incorporation. The allocation from the surplus could be more and continue after the limit is reached. This reserve may not be shared among shareholders during the life of the society, meaning that no withdrawal therefrom may benefit to one or several members. It can therefore not be incorporated to the share capital either, since said share capital may benefit the cooperators (in particular through reimbursement of the shares).

Once the legal reserves funded, the cooperative may contemplate to allocate patronage refund to its member in proportion of their activities with the cooperative (Art. 112). Logically, if the cooperative has a surplus, it may be considered that it charges too much for the services rendered to its members or that it has not paid their own goods or services enough. This excess may make sense while the accounts of the cooperatives are balanced, but once the accounts are set, it might be legitimate to return to the members this excess. Naturally, said excess is proportional too the activities between the member and the cooperator: where cacao was bought at an excessively low price, he who contributed twice as much lost twice as much as well. Therefore, the discount is not computed through strict equality, but through proportionality. Such allocation of discount, however, is not automatic, but subject to the decision of the cooperative, which might prefer saving the money to ensure the cooperative's development. As to cooperators, who make up the general meeting which shall resolve on the patronage refund, some balance must be found between their immediate satisfaction (entire allocation of discount) and a more long-term perspective on the development of their community (no payment, but a collective investment instead).

2.2.3. Limitation to the cooperators' economic rights

The limitation to the cooperator's economic rights can be explained by the non-lucrative character of the cooperative, which is not established to make profit for the benefit of its members, but to allow them to unite their forces and achieve economies of scale. Thus, the distribution of income by the cooperative to the members is limited, through mechanisms such as the limitation of the remuneration of shares, reimbursement of shares at nominal value and control of share transfer.

Limitation of the remuneration of shares

Though it is unanimously held that surplus is not distributed according to the shareholding of each member, this does not mean that shares may not be remunerated in any way. Actually, it would seem unfair to demand a financial contribution which would be entirely not remunerated. He who subscribes to shares services the community since he makes some available to it and deprives himself of said money. It is somewhat akin to a loan he would grant; and the lender always receives an interest on the amount lent. Therefore, some limited remuneration on the shares has been allowed. This practice is not extremely common in Africa which helps promote the idea, with some cooperators and other, that cooperatives are similar to NGOs. The new possibility of remunerating shares could also serve as an incentive to contribute to the society.

Said remuneration may not be compared with the dividend distributed in a commercial company as its extent is limited by the law and is not in proportion to the profit. No remuneration of shares is demanded by the UA, which delegates the choice to the articles of incorporation (Art. 209). Where the articles of incorporation allow for the possibility of articles of incorporation, it is up to the general meeting to determine its amount yearly, within the statutory conditions. At any rate, the Uniform Act has set the maximal rate on the basis of the "discount rate of the Central Bank of the member State" (Art. 209, par. 2). Furthermore, distributions in the absence of a net surplus are forbidden, which prevents the use of free reserves.

Reimbursement of shares

Shares are reimbursed when a member leaves the cooperative (Art. 11). This may happen either because the member willfully resigns or because he/she has been excluded (cf. supra). In either case, the link between the ex-member and the cooperative, therefore, the shares which materialized this link must themselves disappear and be reimbursed.. As noted above, the articles of incorporation must specify the details of such reimbursement in the relative silence of the uniform act, and notably specify if this reimbursement must be done at their nominal value or at another one; the principle of reimbursement is, however, itself certain. The international trend favors reimbursements at nominal value, a simple solution, and often appreciated by the cooperator, given the practice of many African cooperatives.

This reimbursement could be problematic for the distressed society. While the managing organ should in principle reimburse contributions in the year following the departure's effective date, this could be extended in case of financial distress, which could notably happen when a members owning an important fraction of the capital (or several members simultaneously) leaves the society.

Restrictions on share transfers

Shares are nominative, indivisible, impossible to seize, and non negotiable (Art. 49). They may be transferred only under the conditions set forth by the articles of incorporation, for two complementary reasons. First, cooperatives are grouping of persons and the entry into the society requires its approval, with no possibility to escape from this rule and transfer shares to anybody, unbeknownst to the society. Secondly, anybody eager to leave the society can have their shares reimbursed. Articles of incorporation may authorize share transfers but cooperative principles demand that such transfer should be controlled, probably by the managing organ. It is in the same vision that shares may not be seized or pledged.

2.3. Exogenous Dimension

2.3.1. Role of the greater cooperative community

The inclination to regroup, always in order to unite more forces to do business differently, is typical of cooperative companies. On a small or average scale, such regrouping can be achieved through a merger (Art. 174-176)¹⁴. Mergers can be implemented by creation of a new society or by absorption (art. 176). However, mergers may only occur between cooperatives (art. 174), which is cohesive with the edification of a homogenous cooperative community.

At a larger scale, cooperatives are generally structured around umbrella cooperatives, themselves located at three levels. At the first level are unions. They united two or more cooperatives for the fulfillment of their common objectives (Art. 133). Federations are at the second level. They comprise two or more unions, whether their objectives be identical or

¹⁴ Spin-offs are allowed as well.

different, and promote cooperation within the established group, as well as the provision of specified services to the members (Art. 141 et seq.). federation may even have economic activities in the interest of their members, subject to the principle of subsidiary, i.e. these activities may not be already sought by affiliated members (Art. 145). At the third level are confederations, made up of at least two federations. They have the same missions as federations, plus legal information and monitoring (Art. 155). Unions and federations must be in the form of cooperatives (Art. 1). Only federations may elect another form (Art. 151), although they still have the obligation to be registered with the Register of cooperatives (Art. 154).

Unions, federations and confederations must in principle be established in the same OHADA member States. This is probably the reason why the OHADA lawmakers innovated in allowing for transnational cooperative networks of resources and actions, to avoid restrictions to grouping. These networks may consist of unions, federations and confederations with no required common bond, and their objective is to share, for a limited duration, all the resources likely to help their members' activities, improve results, or achieve objectives cohesive with cooperative principles (Art. 160 et ss.).

2.3.2. Relationship between the cooperative and its community

In the first cooperative philosophy, its services were directed only towards its members, who were its only beneficiaries. Since the International Declaration on Cooperative Identity, in 1995, a community dimension was added, the consequence of which being a duty of servicing the community to which the cooperative belongs. Several experiences set those services to the community at the front stage and broke with the idea of bond between the qualities of member and beneficiary: this is in particular the case of social cooperative in Italy and Collective interest cooperative companies in France. This principle of servicing the community is more broadly consecrated in the uniform act, largely faithful to the Manchester International Declaration, but which does not define the "voluntary commitment towards the community".

Generally, the cooperative will take internal measures so that the community may benefit from its investments' windfall. The principle is strengthened by the strong attachment of the cooperative to its territory. Indeed, contrary to commercial companies, cooperatives may not migrate, insofar as they aim to improve the socio-economic conditions of a given community. As an institution promoting development, any delocalization is unthinkable since it targets social coherence of a group in a given area and having the same goals. Some African national laws went further, by prohibiting the adherence to another cooperation in the same territory and with the same purpose. In a more moderate fashion, the Uniform act considers that cooperatives are not meant to compete with each other but rather to work jointly to contribute to the community's development. Therefore, "faithfulness to the cooperative" is stressed (Art. 13, par. 2, c), for lack of which cooperators may be excluded. The allusions, in the definition of the cooperative society, to the social and cultural aspirations, also reflect this idea, as such aspirations relate more easily to communities than to individuals.

3. Organization of the cooperative society

3.1. Creation of the cooperative

3.1.1. Steps of creation

The UA distinguished three phases in the creation of cooperative companies, based on the commercial model: formation, incorporation and registration (Arts. 85 ss.). Formation is the time of negotiation and preparation of the necessary processes in view of the approval of the articles of

incorporation. Incorporation is the approval of the articles of incorporation *stricto sensu* as well as the time of the subscription to the share capital. Registration (with the Register of Cooperative Companies) is the final phase at the end of which the cooperative acquires its legal personality. Thus, during the two initial phases, some actions may be taken by the cooperative, whose status is problematic as the cooperative has not acquired its legal personality yet. For the society in formation, i.e. before its incorporation, acts and undertakings from the founders must be communicated to the community of members at the general incorporation meeting (Art. 90). The members must decide whether to ratify them i.e. to undertake them collectively or not, i.e. leave them in the name of the persons having undertaken the acts. The ratification shall be specifically resolved upon by the incorporation general meeting, by a vote to which the signatories of the acts are excluded, including when determining the quorum and majority (Art. 91). Any ratification is retroactive (so that the acts are deemed to have been taken by the society as of its origin). If not ratified, the acts are not opposable towards the cooperative and their signatories are jointly and severally responsible (art. 92).

As to the undertakings taken by the society between its incorporation and its registration, cooperators may grant a proxy to one or several executives to pass acts on behalf of the society. Provided that these acts and undertakings are determined in the proxy, registration is tantamount to automatic ratification. (Art. 93). Some acts, however, may exceed the scope of the proxy and need to be approved by the general meeting to be ratified, unless the articles of incorporation provide otherwise. In such case, signatories of the relevant acts are excluded and not taken in consideration when computing the majority or the quorum. As in the previous case, if not ratified, the acts are not opposable towards the cooperative and their signatories are jointly and severally responsible

The incorporation general meeting is a crucial stage in the life of the society: as its name suggests, it is at this stage that the decision to incorporate the society is made formal. All present and represented persons are founders of the cooperative. Only those who partake in the formation operations, for instance those who are granted proxy to take acts necessary for the formation, are "initiators" and are subject to the related responsibility. The incorporation legally occurs at the execution of the articles, subject to the subscription to the share capital.

3.1.2. Share Capital

The share capital of the cooperative is variable but must have some substance as of the incorporation and as mentioned in the articles of incorporation. The capital consists of the contribution made by the shareholders and consideration of which they receive shares. Said contributions can either of the three following forms: in cash (i.e. money), in kind (i.e. goods), or in industry (i.e. in work). Contributions in industry are particularly difficult to manage, prone to heated disputes, and we recommend avoiding them. Goods or money contributed to the society become its property, so the society may use them freely. However, while the share capital must be entirely subscribed to on incorporation, it does not have to be immediately paid-up, in the case of contributions in cash (the rule is not applicable to contributions in kind). The cooperators must promise to pay the entire share capital in cash (subscription) but can delay, at least in part, its actual payment. In cooperative companies with a board of directors, one-quarter of the share capital must be immediately paid-up (Art. 270), while this delay is freely determinable by the articles of incorporation in simplified cooperatives (Art. 207).

At this stage, the cooperative is established between its members but has no legal

personality yet, until the registration. For the comfort of the members, the Uniform Act set forth a money deposit mechanism for the period between the money transfers and the acquisition of legal personality. There are some differences between the Scoops (Art. 213) and the SCOPCAs (arts. 274 and 278 ss.) but the mechanism is essentially the same: deposit with a licensed institution so as to be usable by the directors or withdrawals by the contributors in case the cooperative is not eventually registered.

3.1.3. Registration and Publicity Formalities

The cooperative is created by registration with the Register of Cooperative Companies. Somewhat akin to the case commercial companies, but not strictly identically, registers exist both at the national level and that of the area. Nationally, the registered is managed by an "administrative authority", namely "the devolved or decentralized organ of the national authority in charge of the territorial administration or the competent authority, to which the cooperative society's registered seat or immediately attached " (Art. 70). No uniform act is able to determine the competent authority more precisely, due to the national differences as to the administrative structures, thus the OHADA lawmakers wanted to have registers as close to the cooperatives as possible. It appears unavoidable, however, that this necessary imprecision should lead to competence conflicts which would delay the disappearance of ambiguities within member States. Being unrelated to the judiciary, this register cannot, obviously, be confused with the register of companies, although its functioning and missions are similar. The date included therein are gathered in the national and regional files created by the uniform act together with general commercial law; in other words the unity with the Trade and Personal Property Register is reinstated in those fields.

The cooperative shall be registered within a month of its incorporation (Art. 75). Together with the registration request, a folder must be assembled with miscellaneous documents (Art. 75-76). Double registration, (under more than one number) is forbidden (Art. 77). On incorporation, the society acquires legal personality (Art. 78).

During the society's life, other inscriptions may be required to amend, rectify, or complement the initial ones, as in the case of an amendment to the society's articles of incorporation. In all cases, such changes must be signaled to the Register within thirty days of their occurrence, through a request of complementary or corrective mention (Art. 80). Registration as well as amendments since the date of registration must be published in a gazette entitled to receive legal announcements (art. 81). Any appointment, dismissal or resignation of a director shall also be published with the Register within one month (Art. 98).

3.2. The functioning of the cooperative society

3.2.1. The general meeting

The general meeting owns the decisional power in the society. It is competent, in particular, for the approval of the financial statements, the appointment or dismissal of the directors, the appointment of the members of the supervisory body, the amendments of articles of incorporation, the adherence to an umbrella organization, mergers... It may also intercede in the processes of agreement or exclusion of a member. All cooperators are members of the meeting, and participation is personal. Cooperators may however vote by proxy and the articles of incorporation are free to determine the modalities of the vote, notably the number of proxies each holder can be granted (Art. 100).

On resolutions, each member has one vote, regardless of their shareholding (Art. 102).

Meetings of the general meeting may be ordinary or extraordinary, and formal and essential conditions differ from one cooperative form to the other. Nevertheless, the uniform act sets forth the quorum and majority conditions, with the possibility of a second meeting if these conditions were not met the first time.

The cooperator's resolutions are acknowledged in minutes (Art. 104-105). Where the cooperative has more than five hundred members, sections meeting can be organized in conditions stipulated in the articles of incorporation (art. 106). They resolve on the same agenda and appoint delegates who will participate to the actual general meeting. It is up to the articles of incorporation to determine the division in sections, the number of delegates by section and the details of implementation.

3.2.2. Management and Control Organs

Management organs vary depending on the type of cooperative at stake though some rules are common. First, directors have the broadest powers and commit the cooperative towards third parties, even through those who are out of the scope of the corporate purpose (Art. 95-96). Directors are necessarily cooperators¹⁵. The lack of express provision is therefore not equivalent to an acceptance of non-members as directors; for such solution would contravene the provisions of Article 4 which refers to the cooperative principles as to the management. Likewise, their functions are not remunerated and only the expenses in the scope of their mission may be reimbursed (Arts. 263 et 305).

Although details differ depending on the type of cooperative at stake, a general principle of limitation of mandates is set by Articles 300 and 326. Consequently, the chairman of a management committee may not chair another management committee or a board of directors of a cooperative; moreover, no director, including the chairman of the board, may serve as another cooperative's director. These provisions, inspired from company law, make perfect sense for bottom-level cooperatives, but contradict the best-established practices. As to the management of umbrella organizations, one should be reminded, indeed, that unions and federations must exist under the form of a cooperative, namely of a SCOOPCA, so that chairmen of management committees and board of directors may not be elected as directors of an umbrella organization.

In simplified cooperatives, the organs are the management committee and supervision commission. The management committee comprises three members at most, or five if the number of cooperator reaches one hundred (Art. 223). Its members are elected by the general meeting, by a simple majority (Art. 223). The articles of incorporation set the details of the elections and of the governance. The supervisory commission is the control organ of the simplified cooperative (Art. 257). It is composed of three to five members elected by the general meeting (Art. 258). The articles of incorporation organize their election and set the duration of their mandates (Art. 260).

In cooperatives with a board of directors, the two organs are the board of directors and the supervisory board. The board of directors comprises at least five and at most twelve members, who can be natural or legal persons. The articles of incorporation organize their election and set the duration of their mandates (Art. 295). The supervisory board is the control organ of the cooperative with a board of directors. It is composed of three to five members elected by the general meeting among its members

Like the supervisory committee (Art. 262), the supervisory board may verify, or have

¹⁵ Article 223 specifically states so while specifying that only individuals may members of the management committee.

verified, the management of the society by the executives (Art. 340). They may, in particular, interrogate executives, and, in case of failure of their interrogation and danger for the society, convene the shareholders in a general meeting (Art. 119). In a similar fashion, a group of members representing at least one-quarter of the share capital may require the appointment of a management expert before the competent jurisdiction (Art. 120).

Additionally to the aforementioned organs, the cooperatives with a board of directors must appoint a statutory auditor when three conditions are cumulatively met: their membership is at least one thousand, their turnover at least one hundred million CFA Francs, and their balance sheet at least five million CFA Francs (Art. 121). The statutory auditor is elected by the general meeting for three society years within a list established by every member state. Simplified cooperatives have no such obligation.

3.2.3. Responsibility

Three degrees of responsibility need to be examined.

The first degree concerns cooperators. Their commitment with the society may have serious consequences, including their participation to the society's losses (Art. 47). Indeed, if members have theoretically a right to have their shares reimbursed, their participation involves a certain element of risk and they may not stay entirely in the clear if the society is distressed. Namely, they are liable at least to the extent of their shareholding and the articles of incorporation may rise that limit to five times said amount (Art. 210 and 371).

The second degree is that of the initiators. Indeed, the initiators as well as the first members of the managing organs are jointly responsible of the prejudice caused either by the lack of a mandatory mention in the articles of incorporation or by the lack, or the faulty execution, of a mandatory formality related to the formation of the cooperative (Art. 65). Depending on the case, the actions in damages are subject to a five-year prescription, starting from the incorporation date or the challenged amendment (Art. 66).

The third and last degree is that of the executives. They are individually responsible for the third parties for the faults committed in the scope of their management (Art. 122). The responsibility may be joint if several executives partook in the same actions. The individual action (for damages suffered by a third party or a member) is subject to a three-year prescription, starting from the occurrence of the relevant action or of its discovery when such fact was concealed. Finally, other executives may act in the name of the cooperative for the damages suffered by it in the forms proper to each type of society (Art. 128). subject to a three-year prescription, starting from the occurrence of the relevant action or of its discovery when such fact was concealed, or a three-year prescription in case of a serious criminal infraction.

In spite of the silence kept by the Uniform Act on such matter, it is possible that the members of the supervisory commission or board should be sued based on their responsibility as such. Though they may not be challenged for their management actions (which they are not entitled to take), they are in charge of monitoring the management for the benefit of the members and a faulty execution of these functions, especially non-disclosure to members, could be brought against them, notably through a general meeting alert (Art. 119).

3.3. Dissolution of the cooperative

Dissolutions of cooperatives do not differ significantly from those of other companies. We will first study the causes of dissolution and nuance our case as to liquidations.

3.3.1. Causes of Dissolution

Article 177 of the uniform act: states : “The cooperative society ends :

- by the expiration of its stipulated duration ;
- by the fulfillment or extinction of its purpose ;
- by the cancellation of the society agreement ;
- by a decision of the members, in the same condition as for amendments to the articles of incorporation ;
- by anticipated dissolution pronounced by the competent court, upon request of one or several member(s) for a just motive, notably in case of discord between the members, preventing the cooperative from functioning normally;
- following a judgment ordering the liquidation of the assets of the cooperative;
- for any other cause stipulated in the articles of incorporation”.

These causes of dissolution are rather classic, a claue of the provisions on commercial companies. We will note at least, as regards the ending of the society, a cancellation is regarded as a cause of dissolution, the cooperative society, as an institution, being separate from the agreement it originated from. Article 178 is much more original: "The competent court may furthermore, when petitioned by any interested person, dissolve any cooperative if, depending on the case:

- a) the cooperative society has not started its operations within two years of its registration ;
- b) it has not pursued its statutory activities during two consecutive years;
- c) it has not complied with the provisions of this uniform act regarding annual general meetings for two consecutive years ;
- d) it omits for a year, to address to the competent administrations or authorities the rights, notices or documents required by the present uniform deed;
- e) it has had no management, directorship or control organ for at least three months.
- f) it is not organized or does not act in compliance with cooperative principles".

Leaving point (d) aside, whose purpose is to vest the provisions of the UA regarding the disclosure of information to competent authorities with particular resonance, three trends can be noted: the activity of the cooperative, a management compliant with the requirements of the Uniform act, and abidance by the primacy of services to members. Regarding the activity, the Acts disqualifies stillborn companies as well as those in a deep coma. The management of the society, so that the absence of general or board meetings is punished; thus, cooperative democracy is guaranteed, avoiding a dictatorial management spurning the required formalities. The principle of service to members is guaranteed by the threat of dissolution in case of non-compliance.

Finally, one should note that dissolution is not always a punitive measure, but can also be the best solution for healthy business, as evidenced by the fact that the society is allowed one hundred and twenty days as of the date of the dissolution ordered by the court to remedy the situation, which make such order reversible. Furthermore, the intention to dissolve the society shall be inserted in a publication accessible to the general public (Art. 179).

3.3.2. Dissolution/liquidation procedure

The procedures pertaining to liquidations and dissolutions aim to regulate and organize them so as to protect third parties. Dissolution must first be declared within one month in the Register of cooperatives (Art. 84). As cancellation and dissolution are made equivalent, the same solution applied to the former case. The publication makes the dissolution opposable to third parties and automatically opens the liquidation (Art. 180). In order to make the procedure known to all, a publication shall be made in a legal announcement gazette (Art. 181). Furthermore, this

publicity also relies in the mention of the pending liquidation in all acts issued by the cooperative, including mail (Art. 183).

The liquidation proceedings may be organized amicably by the members if provided for thoroughly enough in the articles of incorporation (Art. 182) ; if not possible, it is calqued on the procedure set forth by the uniform act on commercial companies (Art. 196), “ at least its relevant and applicable provisions”. The possibility of an amicable liquidation is a favor to the members as it makes the proceedings more flexible and less burdensome. It must be regulated, though, and the UA demands that the articles of incorporation specify several issues, notably as to the conditions of appointment and remuneration of the liquidator, as well as the litigation solving procedures. The Uniform act states that the liquidator may be chosen among members or not and even be a legal person (Art. 187).

The closing of the liquidation must occur within three days of the dissolution (Art. 191). After this delay and in case of non-compliance, any interested person may petition the court to have the liquidation closed. After the end of the liquidation, the accounts must be filed with the organization in charge of cooperatives, together with the discharge given by the members or the court to executives (Art. 191). The liquidator must require the de-registration of the cooperative within one month, and the ending of the liquidations is also the ending of the legal personality.

As no sharing of the surplus assets on liquidation is possible, Article 196 states that they are devolved to the cooperatives or other institutions or organizations working for the promotion of the cooperative movement. This solution, unusual for a commercial company, is however perfectly cohesive with the cooperative ideals.